Supreme Court, U.S.
FILED
AUG 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

90-209

No. ___

In The

Supreme Court of the United States

October Term, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

IGNACIO CAMBRAX SALGADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT DIVISION THREE

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QUESTIONS PRESENTED

I. WHETHER AN INDIVIDUAL WHO RUNS FROM POLICE OFFICERS IS SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT AT A TIME PRIOR TO THE OFFICERS' GAINING PHYSICAL CONTROL OVER HIM OR ARRIVING IN HIS IMMEDIATE PRESENCE.

II. WHETHER UNPROVOKED FLIGHT FROM POLICE OFFICERS, COUPLED WITH OTHER SUSPICIOUS CIRCUMSTANCES, PROVIDES SUFFICIENT GROUNDS UNDER THE FOURTH AMENDMENT FOR POLICE TO CONDUCT A STOP.

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IGNACIO CAMBRAX SALGADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, State of California, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Three, which held that the Fourth Amendment had been violated and therefore affirmed the trial court's dismissal of felony drug charges against Respondent.

OPINIONS BELOW

The Opinion of the Court of Appeal, as modified on March 15 and March 28, 1990, is reprinted in the appendix hereto, p. App. 1, *infra*.

The Order of the California Supreme Court denying Petition for Review is reprinted in the appendix hereto, p. App. 11, *infra*.

JURISDICTION

The judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division Three, was filed February 26, 1990 and subsequently modified by that Court on March 15 and March 28, 1990. A Petition for Rehearing was denied on March 15, 1990.

A timely Petition for Review was denied by the California Supreme Court on May 31, 1990[1].

Where the highest state court has jurisdiction to review a decision of a lower state court, but refuses to do so, the time for petitioning for a Writ of Certiorari runs from the date of the refusal to review. [*American Railway Express v. Levee*, 263 U.S. 19, 20-21 (1923).]

This petition, filed within 60 days of that date, is timely. This Court's jurisdiction is invoked under 28 USCA section 1257(3).

[1] The Court of Appeal opinion was published at 219 Cal.App.3d 405. However, the California Supreme Court directed the Reporter of Decisions not to publish the opinion in the Official Appellate Reports.

CONSTITUTIONAL PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

"[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . " U.S. CONST. amend XIV, Section 1.

"Right to Truth in Evidence.

Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782, or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press." Cal. CONST. art. I, section 28, subdivision (d).

STATEMENT OF THE CASE[2]

Respondent was charged in a felony information with possession of cocaine for sale. (C.T. 1a.) He brought

[2] The designation "C.T." refers to the Clerk's Transcript, the "R.T." to the Reporter's Transcript.

a motion in Superior Court to suppress evidence alleging that his Fourth Amendment rights had been violated. (C.T. 36.)

At the hearing of said motion testimony revealed that on July 17, 1988, at about 8 to 8:30 p.m. two Orange County deputy sheriffs were conversing near their patrol cars in San Juan Capistrano. (R.T. 3-4, 24-25, 41.)

One of them, Deputy Anderson, noticed respondent standing in an alleyway to the east, talking to an individual known to him as a burglar and narcotics offender. (R.T. 4.) Deputy Anderson was also aware of previous narcotic activity in that area, having been told by at least one person that he had bought cocaine in the area within a house or two of where the deputy was standing, and having seen a known narcotics dealer in the area quite often. (R.T. 5-6.) He figured that some narcotic activity possibly was going on at the time. (R.T. 6.)

After respondent was seen conversing for a short time, Deputy Anderson saw him walk in a northerly direction out of sight. (R.T. 6.) The deputy next saw respondent walking to the west of his location in a southbound direction. (R.T. 6-7.) Deputy Anderson thought it was odd that respondent would make a large circle around the deputies' location and felt he was trying to avoid them. (R.T. 7.)

A short time later, as Deputy Anderson and his trainee, Deputy Hernandez, were in their patrol car, they saw respondent walk back eastbound on the sidewalk. (R.T. 7-8, 42.) The deputies drove up in the street alongside of, and about ten feet from, respondent. Deputy Hernandez testified, "I spoke to him in Spanish and

told [sic] him if I could talk to him for a minute." The deputy subsequently testified that what he said was, "Can I talk to you for a minute?" (R.T. 7-8, 42-43.) The deputies then pulled up parallel to the sidewalk in front of a driveway about 15 to 20 yards in front of respondent. (R.T. 8, 43.) Neither the siren nor the flashing lights of the patrol car were activated, and the car did not block respondent's path. (R.T. 9, 43.)

The deputies got out of the car. When they began to walk toward respondent, he started running northbound, across the street toward some condominiums. (R.T. 9-10, 44.) Neither of the deputies had any weapons drawn at the time and they did not direct any lights on respondent. (R.T. 9-10.) Before he ran, neither of the deputies said anything else to him. (R.T. 9, 44.) After a few seconds, Deputy Hernandez started running after respondent. (R.T. 10.) Neither deputy yelled anything to him and Deputy Hernandez soon lost sight of him after he got into the condominium complex across the street. (R.T. 11, 44-45.)

When respondent bolted, Deputy Anderson used his radio to advise other nearby deputies of the pursuit. (R.T. 11-12.) Deputy Hopp heard the broadcast and then, while in his patrol car, he saw respondent walking one block to the north. (R.T. 25.) After looking in Hopp's direction, respondent started running again. (R.T. 25.) Deputy Hopp did not activate any flashing lights or siren and did not say anything to respondent. (R.T. 26.) He saw respondent run northbound, then stop at a planter box and place something underneath a newspaper, after which he continued running. (R.T. 26, 30, 32.)

Deputy Chance also heard the radio call. Soon thereafter he encountered respondent running in an alley and handcuffed him. (R.T. 35, 30.) Deputy Hopp heard Chance broadcast that he had someone detained on the next street. Hopp drove to that location and saw respondent. He then went to the aforementioned planter box, picked up the newspaper and discovered four plastic bags of white powder. (R.T. 27.)

Deputy Anderson testified that based on the running, together with his other observations of respondent and his knowledge of the area, he suspected that respondent might be involved in some narcotics activity. (R.T. 12-13.) On cross-examination he responded that he had not suspected respondent of criminal activity before respondent ran. (R.T. 13.)

The Superior Court granted respondent's motion and suppressed the cocaine evidence. The Court ruled that the chase constituted a seizure of respondent's person and the recovery of the cocaine was a product of that seizure. (R.T. 50-62.) In so doing, the Court expressed the belief that *Michigan v. Chesternut*, 486 U.S. 567 (1988) "stands for the position that a pursuit is a seizure if a reasonable person would think that they would eventually be detained." (R.T. 62.)

In response to inquiry about the credibility of the officers who testified, the Court indicated:

> No. I don't find they're lacking in credibility. They said everything straight out. They probably could have enhanced their position by saying things differently and I don't think they did, I think they gave us a straightforward version of what happened. I can understand their position.

> We know narcotics are going on and the guy's running, he's probably got narcotics in his pocket. But that isn't the way the case law has allowed us to go. (R.T. 63)

The Superior Court dismissed the case after petitioner indicated its inability to proceed without the cocaine evidence (R.T. 64). Petitioner appealed to the California Court of Appeal, Fourth District, which affirmed the suppression ruling. The California Supreme Court denied a Petition for Review.

HOW THE FEDERAL QUESTION IS PRESENTED

Respondent's motion to suppress evidence was based on the contention that the police activity was in violation of the Fourth Amendment. The trial court granted the motion. The Court of Appeal decision, affirming dismissal, rests solely on the Fourth Amendment grounds. California state courts may exclude evidence obtained as a result of an unlawful search or seizure only if exclusion is mandated by the federal exclusionary rule applicable to evidence seized in violation of the Fourth Amendment. (Cal. CONST. art. I, section 28, subdivision (d); *In re Lance W.*, 37 Cal.3d 873, 896 (1985)).

REASONS FOR GRANTING THE WRIT

I.

AN INDIVIDUAL WHO RUNS FROM POLICE OFFICERS IS NOT SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT AT A TIME PRIOR TO THE OFFICERS' GAINING PHYSICAL CONTROL OVER HIM OR ARRIVING IN HIS IMMEDIATE PRESENCE.

The Court of Appeal in the instant case ruled that respondent had been seized within the meaning of the Fourth Amendment when the deputy started to run after him. The Court described such activity as an "attempt to detain" and an "intended detention." (p. App. 3-4, *infra.*) The Court declared that "giving chase 'in a manner designed to overtake and detain or encourage the individual to give up his flight is a detention.' " (p. App. 4, *infra.*)

Finally, in making its ruling, the Court questioned, "When Hernandez pursued, how many people would believe they were not the object of an attempt to detain? The answer is obvious: no one." (p. App. 7, *infra.*)

Petitioner, believes that an incorrect legal standard was employed in determining that respondent had been seized. In the context of a person fleeing from the police, more than a belief that the person was the object of a police attempt to detain, is necessary. The police conduct should have achieved a restraining effect.

With regard to seizures of persons, this Honorable Court stated in *Brower v. County of Inyo*, 489 U.S. ___, 103 L.Ed.2d 628, 635 (1989):

> Violation of the Fourth Amendment requires an intentional *acquisition of physical control.* [Emphasis added].

The Court also discussed such seizures as involving a "termination of freedom of movement." (*Id.*) Even more recently, in *Michigan v. Sitz*, ___ U.S. ___, 110 S.Ct. 2481, 2485 (1990) this Court again commented:

> (Fourth Amendment seizure occurs "when there is a governmental *termination of freedom of movement through means intentionally applied*" . . .) [first emphasis added, latter emphasis in original].

Similarly, in *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) the Court asserted:

> Whenever an officer *restrains the freedom of a person to walk away*, he has seized that person. [Emphasis added].

In *Galas v. McKee*, 801 F.2d 200 (6th Cir. 1986), cited by this Court in *Brower, supra* at 489 U.S. ___, 103 L.Ed.2d 635, the Sixth Circuit determined that the plaintiff in that action was not seized within the meaning of the Fourth Amendment when he crashed his car and disabled himself in the course of being actively pursued by police. As the *Galas* court noted, this Court observed in *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968):

> Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way *restrained the liberty* of a citizen may we conclude that a "seizure" has occurred. [Emphasis added].

The *Galas* Court went on to state:

> Clearly, during the initial stages of the pursuit when the minor plaintiff decided to flee rather than to obey the defendant officer's directive to stop, the minor was not restrained. (*Galas, supra* at 203.)

In *Roach v. Fredericktown*, 882 F.2d 294 (8th Cir. 1989), the Eighth Circuit also concluded that a police pursuit which ended with the collision of the vehicle pursued and another car did not amount to a Fourth Amendment seizure of the person being pursued. Additionally, in *Cameron v. Pontiac*, 813 F.2d 782 (6th Cir. 1987), officers chased a burglary suspect on foot and even fired shots at him. The suspect then ran onto a freeway where he was struck and killed by a passing vehicle. The Court ruled that he had not been seized.

In contrast, the Court of Appeal in the present matter asserted:

> Federal and California cases have held that giving chase "in a manner designed to overtake and detain or encourage the individual to give up his flight is a detention." (*People v. Washington* (1987) 192 Cal.App.3d 1120, 1126 [236 Cal.Rptr. 840]; *People v. Menifee* (1979) 100 Cal.App.3d 235, 239 [160 Cal.Rptr. 682] [police pursuit of suspects reasonably viewed as an intended detention]; *United States v. Bowles* (5th Cir. 1980) 625 F.2d 526, 532 [detention occurred when officer ran past defendant, turned to face him, held out credentials, and blocked his path].) (p. App. 3-4, *infra*.)

The *Washington* Court cited *Terry v. Ohio, supra*, as authority for the proposition that a police pursuit is equivalent to a seizure. (*People v. Washington*, 192

Cal.App.3d 1120, 1126 (1987).) The Court in *Washington* also relied on this Court's decisions in *United States v. Mendenhall*, 446 U.S. 544 (1980) and *Florida v. Royer*, 460 U.S. 491 (1983). As noted by the Court of Appeal, this court stated:

> A person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. (*Mendenhall, supra*, at 446 U.S. 554.)

The *Washington* Court concluded that by chasing the defendant in that case, the officers gave a "definite signal . . . that he was not free to leave." (*Washington, supra*, at p. 1125.) The Court ruled that giving chase constitutes a seizure. (*Id.* at p. 1126.)

Something that is not addressed in *Washington* or the present case, nor in any opinions of this Court to date, is the fact that the *Mendenhall* test for seizures of individuals has been developed and applied in cases where the issue to be determined was whether police interaction with an individual was a consensual encounter or whether it was a seizure of the person. (*United States v. Mendenhall, supra; INS v. Delgado*, 466 U.S. 210 (1984); *Florida v. Royer*, 460 U.S. 491 (1983).) The persons involved have remained in the immediate presence of officers at the time of the interaction. The impact of a person's attempts to physically avoid such an interaction by means of flight, on the application of the *Mendenhall* formulation has not been specifically discussed.

The issue almost presented itself in *Michigan v. Chesternut*, 486 U.S. 567 (1988), where the respondent ran upon

seeing some police officers. However, there the majority applied the *Mendenhall* test and concluded that a reasonable person would have felt free to leave. (*Chesternut, supra,* at 573-575.) Still, in a concurring opinion Justice Kennedy observed:

> A Fourth Amendment seizure occurs when an individual remains in the control of law enforcement officials because he reasonably believes, on the basis of their conduct toward him, that he is not free to go. . . . It is at least plausible to say that whether or not the officers' conduct communicates to a person a reasonable belief that they intend to apprehend him, such conduct does not implicate Fourth Amendment protections until it achieves a restraining effect. The Court's opinion does not foreclose this holding, and I concur. (*Id.* at 577.)

This latter reasoning appears to have been accepted by the Court in *Brower v. County of Inyo, supra,* and *Michigan v. Sitz, supra.* However, it has yet to be expressed in anything but dicta. The present case presents an opportunity for the Court to clarify this important area of Constitutional law and to resolve some inconsistent interpretations by the lower courts of prior decisions by this Court.

Here, the pursuing officer lost sight of respondent after a short foot pursuit. Soon thereafter, respondent was seen by a second officer and started to run again. However, when he then stopped to discard the cocaine in the planter box he was not being restrained by any officer, nor even actively chased. He was not apprehended until he ran to the next block. Seizure of the cocaine was not the product of an unlawful seizure of respondent.

Moreover, the contraband was not acquired as a result of its "seizure" by police in any event. In a similar factual situation, the defendant in *Hester v. United States*, 265 U.S. 57 (1924) dropped some containers of moonshine whiskey as he was being pursued by a government agent. This Court concluded:

> The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle – and there was *no seizure* in the sense of the law when the officers examined the contents of each after they had been abandoned. [emphasis added.] (*Id.* at 58).

II.

UNPROVOKED FLIGHT FROM POLICE OFFICERS, COUPLED WITH OTHER SUSPICIOUS CIRCUMSTANCES, PROVIDES SUFFICIENT GROUNDS UNDER THE FOURTH AMENDMENT FOR POLICE TO CONDUCT A STOP.

It is well established that an officer may detain a person for questioning under circumstances which fall short of establishing probable cause to make an arrest. (*Terry v. Ohio*, 392 U.S. 1, 25-26 (1968); *Brown v. Texas*, 443 U.S. 47, 51 (1979).) In order to do so the officer must have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity. (*Brown v. Texas, supra*). In making such a determination, the totality of the circumstances must be taken into account (*U.S. v. Sokolow*, 490 U.S. ___, 104 L.Ed.2d 10 (1989).). A trained officer is permitted to draw inferences and make deductions from various objective observations. (*United States v. Cortez*, 449 U.S. 411, 417-418 (1981)).

One of the factors that may properly be considered in making such a decision is a person's flight at the approach of police officers. (*Sibron v. New York*, 392 U.S. 40, 66-67 (1968)). In *Sibron*, the officer heard strange noises at his apartment door and then saw two men who were unfamiliar to him tiptoeing furtively in the hallway. When the officer exited his apartment the two men fled down the stairs. These observations were found to constitute strong grounds *for an arrest*. This Court stated:

> . . . deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea . . . (*Sibron, supra* at 66.)

In *United States v. Jackson*, 741 F.2d 223 (8th Cir. 1984), police officers drove into an alley where they saw the appellant and another man. The second man yelled, "It's the police, man, run." Both did so and the officers gave chase, ordering them to halt. When the men complied, they raised their hands and the officers observed a revolver protruding from the appellant's waistband, for which he was placed under arrest. Applying the test from *Terry v. Ohio, supra*, the Eighth Circuit concluded:

> When Johnson shouted, "It's the police, man, run," and the two men fled, the officers had specific and articulable facts to justify stopping the men under the *Terry* standard. (*U.S. v. Jackson, supra* at 224.)

Similarly, in his concurring opinion in *Michigan v. Chesternut, supra* at 576, Justice Kennedy commented:

> . . . respondent's unprovoked flight gave the police ample cause to stop him.

In contrast, as indicated by the Court of Appeal in the instant case (p. App. 7, *infra*), the California Supreme

Court has held that flight by itself is not sufficient to justify a detention (*People v. Aldridge*, 35 Cal.3d 473, 479 (1984); *People v. Bower*, 24 Cal.3d 638, 649 (1979)).

In the present case, respondent ran from the officers. The only police interaction prior to him doing so was a request by officers to talk to him. Petitioner believes that the fact and manner of his hasty flight provided a reasonable suspicion that respondent was involved in criminal activity and justified a detention.

Additionally, the officers' suspicions were bolstered by their prior observations of respondent which led to their desire to contact him in the first place. They had seen him talking to a known burglar and narcotics offender and they noticed that he had taken a circuitous route in walking through the neighborhood as if to avoid coming near the officers. In addition, the location was known to be one where narcotics trafficking occurred.

In *Brown v. Texas, supra*, cited by the Court of Appeal in the instant case (p. App. 8, *infra*), an observation of the appellant walking away from a second person in an area frequented by drug users was found not to justify a detention. However, there was no flight from officers in that case. Also, there was no indication the officers knew anything about the background of the second person. In contrast, here there are several factors, including respondent's flight in particular, that justified a detention. The Court of Appeal incorrectly concluded otherwise.

The significance which an officer may accord to unprovoked flight in deciding whether to effect a detention is an important Constitutional question and one in

which the California Supreme Court and the Eighth Circuit are in conflict. Lower courts need the guidance of this Court in this area.

CONCLUSION

The facts of the present case are common today in the urban areas of this country. Particularly in places known for heavy narcotics trafficking, people frequently run from the presence of police. Suspicious, based on the flight and often other factors, the police follow and observe the fleeing individuals hastily discard contraband in the course of their exodus. Lower courts need the guidance of this Court in resolving the important Fourth Amendment issues that such facts raise.

In the present case the Court of Appeal ruled that running after such a person constituted a seizure of his person and suppressed the cocaine discarded in the course of his flight. This conclusion is rooted in a misinterpretation of *Terry v. Ohio, supra,* and is in conflict with the holdings and reasoning expressed by this Court in a number of cases, as well as with several Federal Circuit Court cases.

The determination in the instant matter that there were insufficient grounds for a detention was also in error. It was based in large part on two California Supreme Court cases that are in conflict with an Eighth Circuit case regarding the significance to be attributed to unprovoked flight from a police officer.

Accordingly, petitioner respectfully requests this Honorable Court to grant the petition for certiorari.

Dated this 30th day of July, 1990.

Respectfully submitted,
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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	G007557
Plaintiff and Appellant,	)	(Super. Ct. No.
v.	)	C-69779)
IGNACIO CAMBRAX SALGADO,	)	OPINION
Defendant and Respondent.	)	(Filed Febr.
	)	26, 1990)

Appeal from a judgment of the Superior Court of Orange County, Leonard H. McBride and Myron S. Brown, Judges. Affirmed.

Michael R. Capizzi and Cecil Hicks, District Attorneys, Maurice L. Evans, Chief Assistant District Attorney, Thomas M. Goethals and James J. Mulgrew, Deputy District Attorneys, for Plaintiff and Appellant.

Gary P. Ablard and Mary Elizabeth Orr for Defendant and Respondent.

* * *

Ignacio Cambrax Salgado's motion to suppress was granted by the superior court, and the district attorney appeals. The court determined cocaine Salgado attempted to hide was recovered as a result of an illegal effort to detain him. We have no basis to conclude otherwise and affirm accordingly.

I

At about 8 to 8:30 p.m. on July 17, 1988, Deputy Sheriff John Anderson was conversing with another deputy, Max Chance, near their respective patrol cars in San Juan Capistrano. He saw Salgado talking in an alleyway with another man, Eddie Summers, who was known to Anderson as a burglar and narcotics offender. Anderson did not know Salgado or several other individuals who were also standing there. The deputy had made some arrests for drug crimes in the same area. He thought Summers and Salgado might be involved in such activity.

After less than a minute, Salgado walked between some condominiums out of Anderson's sight. He emerged farther away, taking a route the deputy described as "a large circle [around] us." Anderson and his partner, Abel Hernandez, drove up to Salgado. Hernandez testified, "I spoke to him in Spanish and told [*sic*] him if I could talk to him for a minute." (The prosecutor immediately rephrased this to: "So you said to him, 'Can I talk to you for a minute?' " The deputy agreed.) The deputies then pulled into a driveway parallel to the sidewalk some 15 to 20 yards ahead of Salgado. When they began to walk toward him, defendant started running toward nearby condominiums. Anderson, who was Hernandez's training officer, asked what he intended to do. Hernandez took the hint and gave chase, but he quickly lost sight of Salgado.

Meanwhile, Anderson used his radio to advise the other nearby deputies of the pursuit and describe Salgado. He then drove in the direction defendant had run.

Deputy Mitchell Hopp monitored the broadcast and soon spotted Salgado walking about a block from the site of his encounter with Hernandez and Anderson. When defendant saw the deputy, he started running again. Hopp saw him stop near an alley planter box, place something under a newspaper, and begin to run again. Hopp intended to detain Salgado per the radio broadcast if he found him, but did not activate his red lights or call out to him. After Salgado was captured, Hopp found four plastic bags of white powder under the newspaper.

Deputy Chance, Hopp's partner, joined in the hunt on foot when the radio call came out. He quickly encountered Salgado running in an alley and handcuffed him. He did not know why Anderson wished to stop him.

Anderson testified the chase lasted about one minute from beginning to end. When he was asked, "At the time you saw Mr. Salgado start running did you suspect that he was involved in some sort of criminal activity?" he replied, "Yes, when he ran, I did." On cross-examination Anderson admitted he had not suspected Salgado of criminal activity before defendant ran.

II

The district attorney argues the chase did not amount to a detention or attempted detention, but if it did, the deputies were justified by adequate probable cause. He also claims discovery of the contraband was not the product of an illegal search and seizure.

There surely was an attempt to detain at the moment Deputy Hernandez began to chase Salgado. Federal and

California cases have held that giving chase "in a manner designed to overtake and detain or encourage the individual to give up his flight is a detention." (*People v. Washington* (1987) 192 Cal.App.3d 1120, 1126 [236 Cal.Rptr. 840]; *People v. Menifee* (1979) 100 Cal.App.3d 235, 239 [160 Cal.Rptr. 682] [police pursuit of suspects reasonably viewed as an intended detention]; *United States v. Bowles* (5th Cir. 1980) 625 F.2d 526, 532 [detention occurred when officer ran past defendant, turned to face him, held out credentials, and blocked his path].)

The district attorney argues *Michigan v. Chesternut* (1988) 486 U.S. 567 [100 L.Ed.2d 565, 108 S.Ct. 1975] compels a different conclusion. We are not persuaded. The officers in *Chesternut* merely drove alongside a running suspect who jettisoned contraband in plain view. In deciding that conduct did not amount to a detention, the court announced it would "leave to another day the determination of the circumstances in which police pursuit could amount to a seizure under the Fourth Amendment."[1] (*Id.*, at pp. 575-576, fn. 9 [100 L.Ed.2d at p. 573, 108 S.Ct. at p. 1980].)

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[1] Our original opinion in this case has been criticized in a decision from Division One, *In re Christopher B.* (1990), *post.* 455 [___ Cal.Rptr. ___]. Without embarking on an extended analysis, we think that opinion is seriously flawed. The premise of the court's reasoning is the untenable assumption that merely approaching a subject is no different from attempting to run the person to ground after a consensual encounter is declined by the individual's election to flee. The issue that should have been the focus in *Christopher B.* was whether approaching a citizen with "a nine millimeter semiautomatic rifle in low

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In *Chesternut* the Supreme Court held the police conduct "would not have communicated to the reasonable

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ready position" was a detention at the outset. (*Id.*, at p. 458 [ultimately, the court said, "No."]; see *People v. Banks* (1990) 217 Cal.App.3d 1358, 1362 [266 Cal.Rptr. 574].) Instead, in a discussion unnecessary to its decision, the court severely misread *Chesternut* to have decided a question it specifically left open and concluded that chasing a fleeing individual is not a detention at all. (*In re Christopher B., supra*, at p. 464; see *Michigan v. Chesternut, supra*, 486 U.S. at pp. 575-576, fn. 9 [100 L.Ed.2d at p. 573, 108 S.Ct. at p. 1980].)

Part of the *Christopher B.* rationale is that a case we originally relied on in part was depublished. There is a discernible trend in the Court of Appeal to abandon the application of judicial responsibility by taking cues from Supreme Court depublication practices. (See, e.g., *Ford v. Gouin* (1990) 217 Cal.App.3d 1606, 1622, 1627, fn. 5 [___ Cal.Rptr. ___] (conc. opn. of Smith, J. and dis. opn. of Kline, P. J.); *People v. Razo* (1990) 217 Cal.App.3d 616, 629 [266 Cal.Rptr. 158].) We view this trend as a serious inroad on the litigants' constitutional right to an opinion with reasons stated. (Cal. Const., art. VI, § 14.) The Supreme Court states no reasons when it acts on depublication questions. Consequently, when the Court of Appeal bases its own decision on depublication history, it is not giving a reason for the holding. It merely imitates the irked mother who responds "just because" to a child questioning a parental command.

In addition, while the Supreme Court may order us to hear a matter, it may not direct our exercise of judicial authority without an order stating reasons. (*Gillaizeau v. Bank of America* (1986) 179 Cal.App.3d 836, 838-839 [224 Cal.Rptr. 914]; *see also People v. Protopappas* (1988) 201 Cal.App.3d 152, 155, fn. 2 [246 Cal.Rptr. 915].) Depublication orders and refusals to depublish are not adequate for that purpose and are not so intended. (See Note, *Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law*

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person an attempt to capture or otherwise intrude upon respondent's freedom of movement." (*Id.*, at p. 575, fn. omitted [100 L.Ed.2d at p. 573, 108 S.Ct. at p. 1980].) Lights and sirens were not employed; there was no command to halt; and the officers did not attempt to block the suspect with the police car, "or otherwise control the direction or speed of his movement." (*Ibid.*) The court also noted that surveillance or an officer's approach is

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(1977) 50 So.Cal.L.Rev. 1181, 1185, fn. 20 [quoting former Chief Justice Donald Wright]; Grodin, *The Depublication Practice of the California Supreme Court* (1984) 72 Cal.L.Rev. 514, 515, 522; Goodman and Seaton, *Foreword; Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court* (1974) 62 Cal.L.Rev. 309, 314; 9 Witkin, Cal. Procedure (3d ed. 1985) § 582, p. 573; Cal. Civ. Appellate Practice (Cont.Ed.Bar 1985) § 20.10 p. 529.) Although in some instances they have proved to be an accurate indicator of the future, in many other legal prognosticators would have done better reading tarot cards or animal bones.

Moreover, the salutary purpose of the requirement of an opinion with reasons stated is entirely frustrated by relying on depublication decisions. As veteran appellate judges know, visceral reactions and preliminary studies of legal problems, particularly when they are done by law clerks without judicial assistance, are often unreliable predictors of the finished product of detailed research and painstaking exposition of the issues required in writing a formal opinion. Also, when panels of the Court of Appeal repeatedly tell the Supreme Court it appears to be on the wrong course, the higher court occasionally does reverse its apparent bent when it finally fully reviews an issue on the merits. (*See, e.g., In re Huffman* (1986) 42 Cal.3d 552, 560, fn. 6 [229 Cal.Rptr. 789, 724 P.2d 475].) This benefit would be lost if the Court of Appeal were to blindly adhere to the Supreme Court's peremptory disposition of depublication questions.

not a seizure. (*Id.*, at p. 576 [100 L.Ed.2d at p. 573, 108 S.Ct. at pp. 1980-1981].) The opinion left open the question of when police pursuit would constitute a seizure. (*Id.*, at pp. 575-576, fn. 9 [100 L.Ed.2d at p. 573, 108 S.Ct. at p. 1980].)

Here, a deputy "*told* him if I could talk to him for a minute." (Italics added.) Then, the patrol car parked parallel to and ahead of Salgado's path. Although lights and sirens were not employed, the deputies began to walk toward the defendant. Assuming there was no reasonable suspicion for a detention, he was within his rights to eschew a consensual encounter and take flight. (*People v. Washington, supra,* 192 Cal.App.3d at pp. 1125-1126; *see People v. Lopez* (1989) 212 Cal.App.3d 289, 291 [260 Cal.Rptr. 641].) When Hernandez pursued, how many people would believe they were not the object of an attempt to detain? The answer is obvious: No one.

III

We also reject the district attorney's claim that there was reasonable suspicion to support a detention. Other than guilt by association, previous narcotics arrests in the area, and defendant's apparent desire to avoid their company, the deputies had exactly no reason to detain Salgado. Anderson admitted he did not suspect defendant was involved in criminal activity until he ran. But flight by itself is not sufficient to justify a detention (*People v. Aldridge* (1984) 35 Cal.3d 473, 479 [198 Cal.Rptr. 538, 674 P.2d 240]; *People v. Bower* (1979) 24 Cal.3d 638, 649 [156 Cal.Rptr. 856, 597 P.2d 115]), and the other factors were at best marginal.

Moreover, the hour was not late; no exchange of suspected contraband was observed; and the deputies had no previous knowledge of Salgado, much less that he was involved in narcotics trafficking. A conversation with an individual who has been arrested before in an area where other crimes have been committed is not enough, even coupled with a suspect's evident disinterest in conversing with police, to support a detention of a person unknown to the officers. (Cf. *People v. McGriff* (1990) 217 Cal.App.3d 1140 [266 Cal.Rptr. 429]; *People v. Brown* (1990) 216 Cal.App.3d 1442 [265 Cal.Rptr. 552].) The totality of these circumstances, viewed objectively, was not sufficient to suspect Salgado was "engaged in, or poised to commit, a criminal act *at that moment.*" (*United States v. Sokolow* (1989) 490 U.S. ___, ___ [104 L.Ed.2d 1, 13, 109 S.Ct 1581, 1588] dis. opn. of Marshall, J.); see also *Brown v. Texas* (1979) 443 U.S. 47, 51 [61 L.Ed.2d 357, 362, 99 S.Ct. 2637]; *People v. Raybourn* (1990) 218 Cal.App.3d 308 [___ Cal.Rptr. ___]; *People v. Gonzales* (1989) 216 Cal.App.3d 1185 [265 Cal.Rptr. 507].)

IV

Finally, we address the district attorney's contention that the finding of the contraband was not the product of an illegal search or seizure. Here we must examine the following: "The temporal proximity . . . , the presence of intervening circumstances [citation], and, particularly, the purpose and flagrancy of the official misconduct. . . . " (*Brown v. Illinois* (1975) 422 U.S. 590, 603-604 [45 L.Ed.2d 416, 427, 95 S.Ct. 2254].) As to the first and third issues, there can be no question. The only potential intervening circumstance was that Salgado had, at least momentarily,

shaken his immediate pursuer when he encountered another deputy who, although passive, was part of the team attempting to apprehend him. The time involved was very short; and Salgado obviously reacted as though the threat to detain him remained very real indeed, as it in fact had. One deputy was chasing him on foot and could not have been far away. Others were surrounding his location when he dumped the goods. When Hopp observed the hiding of the contraband, there had been no cooling off period sufficient to break the causal chain. (See *People v. Washington, supra,* 192 Cal.App.3d at p. 1127.) In short, the evidence was obtained as a product of an unlawful attempt to detain the defendant.

People v. Holloway (1985) 176 Cal.App.3d 150 [221 Cal.Rptr. 394] does not suggest a different result, as the district attorney contends. There, the officers merely yelled, "Hold it," after defendant's four companions took flight at the approach of the police in a high narcotics area at 2:58 a.m. and he closed his hand into a fist and moved as if to throw something. The court doubted those words alone amounted to a detention, but found there was good cause to detain in any event. In other words, the police acted lawfully there.

People v. Patrick (1982) 135 Cal.App.3d 290 [185 Cal.Rptr. 325] does support the prosecution's position, but we disagree with it. *Patrick* held a defendant faced with an illegal detention must also prove that he would have been illegally searched as well. Otherwise, his jettisoning of contraband would be considered an abandonment. What *Patrick* and the cases it relies upon fail to discern is that a detention is itself a seizure. The result in

Chesternut would have been quite different, we are certain, had the Supreme Court determined the officers' conduct amounted to a detention. That is obvious from a cursory reading of the opinion. To require a defendant to anticipate – or later prove – the probable actions of officers who are already acting illegally, once they finally run him to ground, is to take fiction to a level approaching fantasy.

It is, after all, the prosecution's burden to demonstrate the reasonableness of a warrantless search and the abandonment exception. (*People v. Contreras* (1989) 210 Cal.App.3d 450, 455 [258 Cal.Rptr. 361].) The court in *People v. Menifee, supra,* 100 Cal.App.3d 235 got it right: Discarding contraband in the face of a threatened illegal detention is not abandonment; it is evidence which "is the product of an illegal act in violation of constitutional guarantees and thus inadmissible." (*Id.*, at p. 238.) An attempted illegal detention is sufficient; the court is not required to speculate as to whether an illegal search would have followed had the defendant not tried to get rid of the contraband. (*Id.*, at p. 239.)

Judgment affirmed.

Crosby, J.

We concur:

Wallin, Acting P.J.

Sonenshine, J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division Three, No. G007557

S014944

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

(Filed May 31, 1990).

THE PEOPLE, Appellant

v.

IGNACIO CAMBRAX SALGADO, Respondent

Appellant's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed February 26, 1990, which appears at 219 Cal.App.3d 405. (Cal. Const., Art. VI, Section 14; Rule 976, Cal. Rules of Court.)

LUCAS
Chief Justice

Supreme Court, U.S.
FILED
NOV 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-209

In The

Supreme Court of the United States

October Term, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

IGNACIO CAMBRAX SALGADO,

Respondent.

Petition for Writ Of Certiorari To The Court Of Appeal of California, Fourth Appellate District, Division Three

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

I

AN INDIVIDUAL WHO RUNS FROM POLICE OFFICERS MAY BE SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT AT A TIME PRIOR TO THE OFFICERS' GAINING PHYSICAL CONTROL OVER HIM OR ARRIVING IN HIS IMMEDIATE PRESENCE

Michigan v. Chesternut, 486 U.S. 567, 100 L.Ed.2d 565 (1988) at 571 states the dilemma:

> Petitioner (People of the State of Michigan) argues that the Fourth Amendment is never implicated until an individual stops in response to the Police's show of authority. Thus, petitioner would have us rule that a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual. Respondent contends, in sharp contrast, that any and all police "chases" are Fourth Amendment Seizures. Respondent would have us rule that the police may never pursue an individual absent a particular rise an objective basis for suspecting that he is engaged in criminal activity. (references to parties added)

In the present case, Petitioner requests that clarification is required by this court in order to determine properly those cases that lie between these two extremes as expressed in *CHESTERNUT*. It is precisely between these two extremes that our present case falls, in that often frenzied realm of "hot pursuit". Respondent disagrees that further clarification is needed as to fact situations that fall between an actual physical detention and a "chase". Respondent suggests that this Honorable Court

has given adequate guidance to resolve such Fourth Amendment issues.

Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968), stated:

> Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred (Emphasis added).

Grappling with the notion as stated in *TERRY* that a "seizure" has occurred when a citizen has been *restrained in some way* the court in *United States v. Mendenhall*, 446 U.S. 544 (1980) stated:

> A person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstance surrounding the incident, a reasonable person would have believed that he was not free to leave. *Id.* at 554.

Further, *Michigan v. Chesternut*, 486 U.S. 567, 100 L.Ed.2d 565 (1988), while dealing with investigator pursuits, follows the *MENDENHALL* view of fixing a test that is flexible enough to apply to situations that fall in between the enunciated extremes. The *CHESTERNUT* court followed the reasoning behind the *MENDENHALL* notion of "viewing all the circumstances surrounding a given incident":

> The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not

> free to "leave" will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs. (*Chesternut, supra,* at 100 L.Ed.2d 572)

It appears that by way of the *CHESTERNUT* case the court is prescribing the test to determine what degree of restraint is necessary to implicate Fourth Amendment protections on balance with the degree of coerciveness of the police conduct.

The Statement of the Case as put forth by the Petitioner while correct, omits the flavor of the incident itself, that is, it does not adequately describe the coerciveness of the police conduct which resulted in a restraining effect and ultimately a physical detention of the defendant. It is important to note that while Officer Hernandez was chasing Salgado and Officer Anderson made an open broadcast call stating that Hernandez was in foot pursuit and giving a description of the defendant, that he was aware that Deputy Chance and Deputy Hopp were in the area as all the deputies had been summoned there on an unrelated call. (R.T. 3-4, 24-25, 41). It is clear that at this point Deputy Anderson intended to have the defendant detained. Officers Hopp and Chance received the broadcast and began scouring the area for Salgado and within a minute or two the defendant was detained by Officer Chance. At the time the defendant was physically detained, *none of the Deputies knew the reason for his detention.* It is was only after Deputy Hernandez read to defendant his Miranda rights that he and Officer Hopp went in search of contraband (R.T. 48).

This web of detention that Deputy Anderson began to weave around the defendant, Respondent submits, was

extremely coercive given the fact that the objective facts upon which the detention was initiated were minimal at best. That is to say, that, no criminal activity on the part of Salgado was suspected until he began to run. It is true that he was seen with an individual known to the Deputies as one involved in criminal activity however, there was nothing about their meeting other than the fact that it was a high crime area that led officers to believe that criminal activity was taking place.

II

WHETHER UNPROVOKED FLIGHT FROM POLICE OFFICERS COUPLED WITH NO OR VERY MINIMAL PRIOR SUSPICIOUS CIRCUMSTANCES PROVIDES GROUNDS UNDER THE FOURTH AMENDMENT FOR POLICE TO CONDUCT A STOP

In the present case there was no suspicion of criminal activity on the part of the defendant until he ran. Does running per se provide reasonable suspicion and objective facts upon which to initiate a detention? Given the tests advanced by *MENDENHALL* and *CHESTERNUT* the answer would seem to be; No. In viewing all the circumstances surrounding the incident the mere fact of running would necessarily only be a factor to consider.

Petitioner suggests that the "running" was bolstered by other suspicious circumstances, i.e., high crime area and the defendant conversing, along with others, with a known narcotics dealer. Therefore, Petitioner reasons, there were adequate facts upon which to detain. However, applying the flexible test of *MENDENHALL* and *CHESTERNUT* and further elaborated in *U.S. v. Sokolow*, 490 U.S. ___, 104 L.Ed.2d 10 (1989) as the "Totality of

Circumstances" test, the opposite would be so. Any significance an officer may accord to an unprovoked flight would not be in a vacuum but rather would be considered as another factor in light of all of the surrounding circumstances balancing the degree of reasonable suspicion and objective facts with the conduct of the police.

CONCLUSION

This Court is presented with a fact situation which contains little or no objective facts from which to base a reasonable decision to initiate a "Hot-Pursuit" detention. This Court, Respondent respectfully submits, has given sufficient guidance, by way of a flexible test, to determine if the Fourth Amendment should be implicated. This Court has already set the boundaries and parameters by which to decide the varying factual situations as they arise.

Accordingly, Respondent respectfully requests this Honorable Court to deny the Petition for Certiorari.

Dated: February 1, 1991

Respectfully submitted by,

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